

*In the Matter of Samuel Williams, William Paterson University*  
CSC Docket No. 2010-987  
OAL Docket No. CSV 10408-09  
**(Civil Service Commission, decided July 13, 2011)**

The appeal of Samuel Williams, a Chief Operating Engineer 1 at William Paterson University, concerning his release at the end of his working test period, effective August 23, 2009, was heard by Administrative Law Judge Tahesha L. Way (ALJ), who rendered her initial decision on March 28, 2011. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 13, 2011, accepted and adopted the ALJ's recommendation to reverse the appellant's release at the end of his working test period and order that the appellant complete a new working test period.

### **DISCUSSION**

The appellant received a regular appointment to the title of Chief Operating Engineer 1 and began his working test period effective February 23, 2009. The appointing authority extended his working test period on June 16, 2009. Thereafter, the appointing authority released the appellant at the end of his working test period due to his unsatisfactory job performance, effective August 23, 2009. Specifically, the appellant's supervisor Bal Raj Vohra, an Associate Director of University Facilities, issued an unsatisfactory Interim Report on Progress of Probationer (Progress Report) on April 15, 2009 for the first half of the appellant's working test period for Chief Operating Engineer 1. Vohra indicated that the appellant lacked the knowledge and experience in air conditioning equipment and systems, and noted several assignments he claimed the appellant had issues performing properly. On June 16, 2009, Vohra issued the appellant's second Progress Report, which indicated that his performance was unsatisfactory and that the working test period was to be extended. On July 16, 2009, Vohra issued the appellant a third Progress Report which indicated that his performance was unsatisfactory. On August 13, 2009, Vohra completed a Progress Report, which indicated that due to the appellant's unsatisfactory performance, he was being released at the end of his working test period. Specifically, Vohra indicated that the appellant lacked planning skills, record-keeping skills, communication skills, self-sufficiency and knowledge of Heating, Ventilation and Air-Conditioning (HVAC) refrigeration, energy efficiency and cost-savings recommendations. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that the essential background facts of the matter were not in dispute. Specifically, she noted that in 2006, Scott Bowersox was provisionally appointed to the title of Chief Operating Engineer 1. Subsequently an open-competitive examination was announced for the title and the appellant, a veteran, ranked first and Bowersox, a non-veteran, ranked sixth on the resulting eligible list. The appointing authority returned the certification indicating that it wanted to appoint Bowersox to the title since it asserted that the appellant did not possess the required experience and license. However, the certification was returned, notifying the appointing authority that it could not bypass the appellant in light of his veterans preference and the fact that he did meet the announced requirements.<sup>1</sup> Thereafter, the appointing authority appointed both the appellant and Bowersox to the title of Chief Operating Engineer 1.<sup>2</sup> The ALJ noted that Vohra would assign the appellant work directly or through Bowersox. The ALJ also noted that Vohra only personally observed the appellant on one occasion, and instead relied upon feedback provided by Bowersox and other staff in assessing the appellant's work. The appellant testified that he was never provided with his individual job responsibilities nor was he provided with any feedback of his alleged deficiencies. Bowersox testified that the other employees were told that the appellant was there to work on "special assignments." Bowersox also testified that he was advised that if the appellant successfully completed his working test period, Bowersox would lose his position.

The ALJ found that the majority of the appellant's testimony was more credible than the testimony of the appointing authority's witnesses. In this regard, the ALJ did not find it credible that the appointing authority had budgeted for two Chief Operating Engineer 1 positions. Moreover, the ALJ did not find it credible that the appellant's work was unsatisfactory. The ALJ noted that Vohra often couched his answers in generalizations, attempted to avoid pointed questions and nitpicked. For example, Vohra could not thoroughly explain the reasoning for his opinion that the specifications provided by the appellant for a new dishwasher, which Vohra testified were insufficient, were different from the specifications provided by Bowersox, which the appellant testified were the same specifications he provided. Vohra also contradicted himself on several occasions. For example, he testified that he liked personnel meetings instead of e-mails, but he also testified that he was very busy. Moreover, Vohra continued to underscore the appellant's deficient leadership abilities, but told the appellant that he was not a supervisor. Vohra testified that the appellant failed to complete his tasks in a timely manner, but admitted he never advised the appellant of any dates for the completion of the

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<sup>1</sup> The requirements were five years of experience in work involving the operation, maintenance, and emergency repair of power and heating plants and auxiliary equipment, two years of which shall have been in a lead worker capacity, at the level of a Red Seal Operator. Appointees were required to possess an Operating Engineer's License (Gold Seal Minimum).

<sup>2</sup> Due to the removal of eligibles from the certification, Bowersox was reachable for appointment.

tasks. The ALJ found that the only aspect of the appellant's performance that Vohra credibly testified to concerned the appellant's lack of energy-conservation practices and the appellant's need for a federal Environmental Protection Agency (EPA) 608 CFC Certification (CFC). The ALJ also found the appellant's testimony credible that he was not provided with his specific job responsibilities or any feedback regarding his deficiencies, other than his need for a CFC. Specifically, the ALJ found that the appellant came across as sincere in desiring to know any deficiencies and once he was told that he lacked a CFC, he immediately obtained the CFC. However, after the appellant obtained a CFC, Vohra was not satisfied that the appellant obtained it on-line. The ALJ also found that although Vohra did not exhibit any dislike of the appellant, his bias in favor of Bowersox was readily apparent. In this regard, Vohra emphatically testified that Bowersox was "too valuable."

The ALJ found that the appellant was not given any orientation or assignments from Vohra on February 23, 2009. Rather, Vohra advised the appellant that he would contact him, if necessary. Additionally, the ALJ found that although the appellant was read his job responsibilities sometime in March, he was not provided with a copy. Moreover, although the appellant received a copy of his second Progress Report and first and second extension reports, with supporting documentation, he did not receive a copy of his first Progress Report or any documentation explaining the basis for the unsatisfactory rating. The ALJ found that the appellant was never given any specific deadlines for completion when he received assignments and the only feedback he received from Vohra concerned his lack of a CFC. The ALJ also found that the appointing authority did not demonstrate that a second Chief Operating Engineer 1 position was budgeted. The appellant was hired so that the appointing authority could appoint Bowersox, who was not reachable due to the appellant's veterans status, and Bowersox was aware that either he or the appellant was in danger of losing his job if the other proved successful in his working test period.

Based on the above findings, the ALJ concluded that the preponderance of evidence established that the appointing authority exercised bad faith in the evaluation of the appellant during the course of his working test period. Specifically, the ALJ noted the appointing authority's disregard of Civil Service law in attempting to hire Bowersox, even though the appellant was a veteran, and the appointing authority's subsequent hiring of both, when told it could not bypass the appellant, since there was no proof of a second budgeted position. Rather, Vohra acknowledged that only one Chief Operating Engineer 1 position was needed and the appellant was introduced to the other employees as a "special assistant." The ALJ found that good faith essentially necessitates that Vohra, as a primary supervisor, personally observe the appellant at work on more than one occasion, and not utilize the feedback of other personnel, namely Bowersox. Moreover, she found that it was unconscionable for Vohra to have delegated his supervisory responsibility for the appellant to Bowersox. Further, good faith requires that the

appellant receive the mandatory individual job responsibilities and standards, and that proper counseling of any deficiencies be provided. However, Vohra failed to do so. Finally, the ALJ found that the only area that the appellant was not fully conversant was with energy-conservation practices, however, it was only a small piece of the subject position and can only be fairly evaluated under a different set of circumstances. Therefore, the ALJ found that the appellant had satisfied his burden of proof and reversed his release at the end of his working test period and ordered that the appellant complete a new working test period.

In its exceptions, the appointing authority initially argues that the ALJ improperly shifted the burden of proof to it to show that it acted in good faith, and thereby, improperly recommended a new working test period. Specifically, the appointing authority notes that the ALJ found that it failed to provide any proof that a second position was budgeted. Moreover, it argues that it has no burden to prove that the terminated employee is unfit for the job, since it is the employee's burden of proof. It also asserts that the ALJ improperly found that it disregarded Civil Service law when it initially bypassed the appellant. The appointing authority argues that at no time did it disregard Civil Service law. Rather, it determined that the appellant did not possess the requisite skills and experience for the position, and decided instead to appoint Bowersox. Further, it notes that it complied with all of this agency's directives. Additionally, the appointing authority argues that the ALJ failed to give due consideration to the evidence it provided regarding the appellant's unsatisfactory performance during his working test period. For example, it disputes that Vohra delegated his supervisory responsibilities over the appellant. It maintains that the ALJ completely disregarded the myriad of assignments during which Vohra had contact with the appellant. The appellant also asserts that the ALJ improperly credited Williams' testimony that he submitted the required information to Vohra, since Vohra was the only one able to determine whether the information he received from the appellant was sufficient.

Moreover, the appointing authority contends that the ALJ erred in finding that Bowersox provided any feedback to Vohra with regard to the appellant. Therefore, it argues that it is evident that the ALJ failed to give due consideration to the evidence in the record that Vohra followed up with the appellant, but the appellant failed to satisfactorily complete his assignments. Additionally, the appointing authority argues that the ALJ made credibility determinations that were unreasonable and inconsistent with the record. The appointing authority notes that a working test period is not to provide an employee with further training to qualify him or her for the position. Rather, it is to provide an employee an opportunity to "demonstrate that he is competent to discharge the duties of the position." *See Briggs v. Department of Civil Service*, 64 N.J. Super. 351, 355 (1960). Therefore, the appointing authority claims that the appellant did not meet his burden of proving that the appointing authority's actions were in bad faith and the

Commission must uphold the appellant's release at the end of his working test period.

In his cross exceptions, the appellant argues that the ALJ correctly found that the appointing authority's actions were in bad faith. The appellant maintains that once the appointing authority was told that it must appoint him, it did not provide him a working test period for the position at issue. For example, he notes that the appointing authority removed the supervisory responsibilities from his position, and instead had Bowersox perform those duties, although both were supposedly in the same title. Moreover, the appellant contends that the Commission should defer to the credibility determinations of the ALJ.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's assessment that the appellant's release at the end of the working test period should be reversed. Initially, it is noted that the ALJ did not place the burden on the appointing authority to prove that it lacked bad faith.<sup>3</sup> Rather, the witnesses demonstrated through their testimony that the appellant's release was in bad faith. The ALJ determined that the testimony of Vohra was not credible and he lacked specificity and attempted to avoid pointed questions. Moreover, Vohra contradicted himself on several occasions with regard to the appellant's performance. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. Accordingly, the Commission finds the appointing authority's exceptions in this regard unpersuasive and finds that the appellant has established bad faith in his release.

The Commission notes that although the appointing authority disputes the ALJ's conclusion that it disregarded Civil Service law with regard to its attempted

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<sup>3</sup> N.J.S.A. 11A:2-21 provides that the appellant has the burden of proof in a working test period appeal. *See also, N.J.A.C. 4A:2-4.3(b).*

bypass of the appellant, a veteran, and appointment of Bowersox, its initial attempt to appoint Bowersox, who had been serving provisionally, instead of the appellant, a veteran, does have the appearance of circumvention of Civil Service law and rules. *See N.J.S.A. 11A:5-6, N.J.A.C. 4A:4-4.8(a)3i and N.J.A.C. 4A:5-2.1.* The appointing authority's actions in attempting to bypass a veteran, allowing Bowersox to provide information that Vohra utilized to determine that the appellant performed unsatisfactorily, and the failure to provide the appellant with his specific job responsibilities or a plan for remedying his alleged deficiencies, establish bad faith and warrant a reversal of the appellant's release.

However, although the appellant will be reinstated to his position, he has not obtained permanent status. The appellant must successfully complete a working test period in order to obtain permanent status. In State service, the duration of the working test period is four months, which may be extended for an additional two months. *See N.J.S.A. 11A:4-15(a) and N.J.A.C. 4A:4-5.2(b)2.* Although the appellant has shown bad faith in his release, the record does not adequately establish the appellant's satisfactory work performance. *N.J.A.C. 4A:4-5.3(a)* provides that the appointing authority shall prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period. The Commission emphasizes that employees should be apprised of their work performance throughout the working test period and such performance should be documented. For instance, the appellant states that he never received written instructions regarding his responsibilities nor was he told what specifically needed to be improved. Therefore, under these circumstances, it is appropriate to afford the appellant a new four-month working test period, so that he will have an opportunity to demonstrate satisfactory performance. Initially, based on the concerns previously cited, *i.e.*, Vohra's reliance on Bowersox and others for their opinion on the appellant's performance, and Vohra only personally supervising the appellant's work on one occasion, the appellant should not be supervised by Vohra during his new working test period. Rather, the appellant should be assigned to a different supervisor. In this regard, the appointing authority is reminded of its responsibilities to fairly evaluate the appellant during his new working test period, which would include providing him with a clear written description of his job responsibilities, timely notice of any deficiencies and an opportunity to cure those deficiencies.

With regard to back pay and counsel fees, in non-disciplinary appeals, such as an appeal of a release at the end of the working test period, the standard for determining whether an appellant is entitled to back pay and/or counsel fees is governed by *N.J.A.C. 4A:2-4.3(c) and N.J.A.C. 4A:2-1.5(b).* *N.J.A.C. 4A:2-1.5(b)* provides, in all appeals other than disciplinary and good faith layoff appeals, back pay and counsel fees may be granted as a remedy where an appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. In *In the*

*Matter of Anthony Hearn*, 417 N.J. Super. 289 (App. Div. 2010), the court noted that no rule had been promulgated limiting an award of attorney's fees for sufficient cause under N.J.A.C. 4A:2-1.5(b) to a showing of bad faith or invidious motivation by the agency. The court explained that interpreting and restricting the meaning of that phrase through adjudication rather than rulemaking was contrary to N.J.S.A. 11A:2-22 and the Administrative Procedure Act. Accordingly, since nothing in N.J.A.C. 4A:2-1.5(b) authorized the Commission to define "sufficient cause" as synonymous with "bad faith or invidious motivation," utilizing the adjudication process to do so made a material change in the meaning of "sufficient cause" and the court found that the Commission erred in denying Hearn's request for attorney's fees since he was required to prove bad faith or invidious motivation. In the absence of more specific guidance by rule regarding the discretion of and limitation upon the Commission in awarding attorney's fees to a prevailing appellant, the court in *Hearn* considered the merits of the case as well an ALJ's recommendation to award attorney's fees and concluded that sufficient cause existed to award attorney's fees. In other words, in the absence of a rule to define "sufficient cause" for purposes of the application of N.J.A.C. 4A:2-1.5(b), the court evaluated the various merits of Hearn's case and concluded that sufficient cause had been established. Although *Hearn*, *supra*, addressed only the issue of counsel fees, the rule provision in question, N.J.A.C. 4A:2-1.5(b) applies the same standard to back pay awards.

In evaluating the underlying merits of the appellant's case, the Commission finds that other sufficient cause is not evident in this case. In this case, the Commission has not found that the appellant is entitled to a permanent appointment based on the successful completion of his working test period. Rather, he is simply entitled to a new four-month working test period. Therefore, sufficient cause has not been demonstrated in this matter to award back pay or counsel fees. See e.g., *Rocky E. Rembert v. New Jersey Department of Personnel and Merit System Board*, Docket Nos. A-0207-04T3 and A-2098-04T3 (App. Div. March 24, 2006), *In the Matter of Melvin Robinson* (MSB, decided December 21, 2005). Compare, *In the Matter of Randy Geis* (MSB, decided November 20, 2002) (The appellant was awarded permanent status, back pay, benefits, seniority, and counsel fees where he was not released for specific work-related deficiencies and the record established that he had otherwise satisfactorily completed his working test period); *In the Matter of Tracy Bowers* (MSB, decided November 10, 1992) (The appellant was entitled to permanent status, back pay, benefits, seniority, and counsel fees where the record established that the appellant had satisfactorily completed his working test period and the appointing authority nonetheless improperly released him from employment).

## **ORDER**

The Commission finds that the appointing authority's action in releasing Samuel Williams at the end of his working test period was not justified. Therefore, the Commission reverses that action and upholds the appeal of the appellant. Further, the Commission orders that the appellant be afforded a new four-month working test period, with a new supervisor, in the title of Chief Operating Engineer 1. However, back pay and counsel fees are denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.